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87-1182

Docket No. ____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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WALTER A. RASCHICK,

PETITIONER,

VS.

PRUDENT SUPPLY, INC. AND
RED LINE MEDICAL SUPPLY, INC.,

RESPONDENTS.

= =

ON PETITION TO THE COURT
FOR WRIT OF CERTIORARI
FROM THE U. S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 87-5120

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTIONS FOR REVIEW

Did the Court of Appeals, in its decision granting summary judgment against Petitioner in his age discrimination action, erroneously deny Petitioner a trial in which factual disputes and inferences should have been properly placed before a jury for their determination?

Did the U. S. Court of Appeals, Eighth Circuit, graft an additional 5th prong, heretofore unknown in the law, to the Supreme Court's 4-prong McDonnell-Douglas test?

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QUESTIONS FOR REVIEW

Did the Court of Appeals, in its decision granting summary judgment against Petitioner in his age discrimination action, erroneously deny Petitioner a trial in which factual disputes and inferences should have been properly placed before a jury for their determination?

Did the U. S. Court of Appeals, Eighth Circuit, graft an additional 5th prong, heretofore unknown in the law, to the Supreme Court's 4-prong McDonnell-Douglas test?

LOWER COURT OPINIONS

The Federal District Court (App. pp. 45--60) granted summary judgment against Petitioner on the basis that Petitioner had not met two prongs of the 4-prong McDonnell-Douglas criteria in his age discrimination suit. The

U. S. Court of Appeals for the Eighth Circuit (App. pp. 32-44) affirmed the summary judgment decision of the District Court, basing its decision, however, solely on the fourth-prong of the criteria, namely, that Petitioner had not established a prima facie case that Red Line had replaced him.

JURISDICTIONAL STATEMENT

Judgment of the Court was submitted September 4, 1987; entered October 15, 1987. Jurisdiction of the United States Supreme Court is authorized under 28 U.S.C.A. 1254(1) and U. S. Supreme Court Rule 17. Notice that Petitioner is seeking a Writ of Certiorari was made to Federal Court of Appeals, Eighth Circuit, on January 5, 1988. The same date Respondents were served.

The lower court has attempted to graft

another prong to McDonnell-Douglas' 4-prong test for establishing a prima facie case of age discrimination in employment.

This Court's wisdom is sought as to whether the Court of Appeals' two-year waiting period for a replaced older worker is to become the law of the land, thereby establishing a "5th prong," or to retain the present 4-prong standard. See Massachusetts Binding & Insurance Co. v U.S., 77 S.Ct. 186, 352 U.S. 128, 1 L.Ed. 2d 189 (1956); (U.S. Supreme Court granted cert. where important questions of construction of federal act needed to be decided.)

STATUTORY PROVISIONS

29 U.S.C.A. 626(c)(1) provides: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That

the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter."

29 U.S.C.A. 626(c)(2) provides: "In an action under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

29 U.S.C.A. ss. 621(a) provides: "The Congress hereby finds and declares that: (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a

common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce."

29 U.S.C.A. ss. 621(b) provides: "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

29 U.S.C.A. 623(a)(1) relating to

prohibitions against age discrimination makes it unlawful for any employer: "[t]o fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;"

STATEMENT OF THE CASE

A. Nature of the case, course of the proceedings, and disposition in the courts below.

Petitioner filed suit in the United States District Court, District of Minnesota, alleging that his employment with Red Line was terminated as a result of age discrimination. The suit was based upon the Age Discrimination in Employment Act, 29 U.S.C. ss. 621, et. seq.

Following the filing of an Answer by Red

Line, depositions were taken of Petitioner and key employees of Red Line. Thereafter, Red Line filed a Motion for Summary Judgment. The District Court granted summary judgment in favor of Red Line. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals, after receiving written arguments, affirmed the granting of summary judgment by the District Court.

B. Statement of facts.

Raschick, who was 55 years of age, was hired as a full-time telemarketing manager by Red Line in July 1983 and fired in October 1983. (Raschick Depo. p. 3).[1] Bill Crews, who was 32 in 1983, testified that the telemarketing department continued after Raschick left. Crews had responsibility for only (emphasis added) the telemarketing

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[1] Factual references are to the depositions in the Court of Appeals' record.

department from the end of October of 1983 through the first of January of 1984. (Crews; Depo. 6, 55).

Red Line hired Jane Levy and designated her assistant marketing manager within two months of Raschick's discharge.

Red Line in November 1986 had a telemarketing program with a manager and more than one, less than five employees (Crews Depo. p. 90; Appendix, p. 64 Jackie Anderson Aff.)

Raschick, with decades of marketing experience, who had for 20 years directed Queen Bee Advertising, Inc., with 77 employees, (Raschick Depo. p. 16), was induced by a Red Line newspaper ad, that promised unlimited opportunity through a position directly answerable to the president, to apply his considerable expertise and experience for Red Line's benefit. (Goldenberg Depo. p. 15). Raschick testified that Crews related the company goal to Raschick as that of his department opening 20% of

eligible nursing homes contacted by telephone. (Raschick Depo. p. 48). The 20% goal was the only goal the company gave Raschick. (Raschick Depo. p. 48). Raschick testified that his department averaged 40% and that his department's accounts over a long period could account for millions in sales. (Raschick Depo. p. 45).

Red Line's president, Goldenberg, told Raschick, "Despite the obstacles that we put before you, you have done a masterful job" (Raschick Depo. p. 41).

Red Line admits Teri McEwen began a full scale telemarketing effort in November, 1980; ending in 1981, when she was promoted.

Another telemarketing program was begun in December 1982, using Jim Bloomer, until he resigned in June, 1983. Terri McEwen then returned to telemarketing.

Raschick then was hired as full-time telemarketing manager. When Raschick was fired, Bill Crews took control of the

department and the two remaining operators, Lane Hagemeyer and Teri McEwen. (Crews Depo. p. 55)

Two months after Raschick's dismissal, Jane Levy was hired to manage telemarketing under supervision of Ron Opdahl, who managed what Red Line designated as the marketing department. Levy was fired in March, 1984. (Appendix, p. 64, Anderson Aff.).

David Lehman replaced Levy, managing telemarketing along with other, unnamed, tasks. In July 1985, a full-time telemarketing mangager was employed, Suzanne Parker. (Id.)

C. Jurisdiction of Federal District Court

Jurisdiciton in the Federal District Court was exercised under the provisions of the Age Discrimination in Employment Act, 29 U.S.C. ss.621, et seq.

ISSUES

1. Did the Court of Appeals, in its decision granting summary judgment against Petitioner in his age discrimination action, erroneously deny Petitioner a trial in which factual disputes and inferences would have been properly placed before a jury for their determination?

2. Is the Court of Appeals' 2-year waiting period for a replaced older worker to become the law of the land, thereby establishing a "5th prong" to be surmounted or, will the present 4-prong standard be retained?

SUMMARY OF THE ARGUMENT

In July, 1983, 55-year-old Petitioner, a veteran marketing man, was hired by Respondents to fulfill a marketing idea of the president of the Respondents' companies,

namely to develop telemarketing, i.e., sales made by telephone. Promises were made as to the companies' commitment to develop a successful marketing tool and to give independence to Petitioner to use his skills.

From the beginning, the National Sales Manager started to sabotage the project by taking control and limiting the new department's sales territory. The National Sales Manager fit--as did almost all key employees--the Respondents' youth orientation.

Frustrated by lack of sales territory, Petitioner submitted his resignation. This resignation was not accepted. Petitioner, instead, was reassured by promises of adequate sales territory and encouraged by being told he was doing a good job; that key employees were satisfied with his work.

After the abrupt termination, Respondents resisted Petitioner's unemployment compensation claim; based not upon dissatisfaction with work performance, but on the assertion

that Petitioner had resigned! Although the resignation claim was found spurious by the State of Minnesota, the allegation was echoed by each key employee deposed.

Claims of re-evaluating the telemarketing idea and lack of performance surfaced as a hind-sight, straw-clutching reaction to Petitioner's lawsuit. So did the claim that Petitioner's job was not replaced until several years after his discharge. This simply was not so. Continuous replacements for a Telemarketing Manager were sought; all replacements were under forty (40), to fit the company's youth program.

A prima facie case of age discrimination was clearly established by Petitioner and the granting of Summary Judgment is clearly erroneous.

Argument

I

The Court of Appeals, in its decision granting summary judgment against Petitioner in his age discrimination action, erroneously denied Petitioner a jury trial resulting in a manifest injustice.

In determining the merits of a Motion for Summary Judgment, the trial court must view the facts in a light most favorable to the non-moving party, and the movant has the burden of convincing the court that there are no genuine issues of material fact which would permit the fact finder to rule in favor of the non-moving party. Anderson vs. Liberty Lobby, Inc., _____ U.S. ____, 106 S.Ct. 2505, 2512 (1986); see also: Buller vs. Buechler, 706 F. 2d 844, 846 (8th Cir. 1983); Ralph's Distributing Co. vs. AMF, Inc., 667 F. 2d 670 (8th Cir. 1981).

In making the foregoing determination,

the non-moving party is entitled to the benefit of all reasonable inferences which may be made from the underlying facts disclosed by pleadings, depositions and affidavits included in the record. Vette Co. vs. Aetna Casualty & Surety Co., 612 F. 2d 1076 (8th Cir. 1980).

To resist a Motion for Summary Judgment in age discrimination claims, a plaintiff must establish a prima facie case of age discrimination. See: Kephart vs. Institute of Gas Technology, 630 F. 2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981); Stock vs. Horsman Dolls, Inc., 27 F E P Cases 1423 (D.S.C. 1981); Matson vs. Cargill, Inc., 618 F. Supp. 278, 281 (D.C. Minn. 1985).

In most complaints asserting discrimination, whether it be race, sex, or age, an aggrieved party is not likely to have available to them direct evidence, particularly statements of the wrongdoers, of discriminatory behavior. Discrimination tends

to be more subtle and when consciously done is not likely to be openly disclosed because of sanctions available in the court to remedy the problem. Because of the difficulty in proving the existence of unacceptable attitudes and activities such as age discrimination, the courts have set forth a common formula for establishing a prima facie case of such discrimination. The plaintiff must show; (1) that he is within the protected age category under the statute; (2) that he was performing his job at expected levels of performance; (3) that he was discharged; and (4) that the employer sought a replacement to do the same kind of work, thus demonstrating a continued need for the same services and skills. McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973). See: Halsell vs. Kimberly-Clark Corp., 683 F. 2d 285 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983); Matson vs. Cargill, Inc., supra.

If the plaintiff establishes a prima

facie case, the burden shifts to the employer to set forth a valid reason other than age for discharging plaintiff. If this occurs, the burden shifts back to the plaintiff to demonstrate that the reasons set forth for the discharge by the employer are pretextual. Texas Department of Affairs vs. Burdine, 450 U.S. 248 (1981).

If plaintiff sets forth sufficient evidence which creates an inference of age discrimination rebutting the stated alleged business reasons for the discharge, summary judgment is inappropriate. Steckl vs. Motorola, Inc., 703 F. 2d 392 (9th Cir. 1983); Matson vs. Cargill, Inc., supra.

There are few issues less suitable for summary judgment than issues of intent and motivation, such as presented by assertion in age discrimination suit, that reasons advanced for replacing an older employee with a younger are a mere pretext for unlawful discrimination. Chipollini v. Spencer Gifts,

Inc., 613 F. Supp. 1156 (D.C. N.J. 1985).

Applying the foregoing principles and the criteria set forth in McDonnell, supra, Petitioner did prove a prima facie case of age discrimination.

The Court of Appeals decided sufficient evidence warranted a finding that the first three criteria to be established had been met, viz., that Petitioner was within the protected age category, he was performing his job at expected levels of performance and he was discharged. However, the Court, decided that there was not sufficient evidence presented upon which a reasonable jury could fairly conclude that Red Line sought a replacement to do the same kind of work.

The Court did not fairly consider testimony of Raschick and the admissions against interest of Red Line. The Court rather than give the benefit of reasonable inferences to Raschick erroneously granted summary judgment against Raschick by considering only portions

of the proof of Red Line suitable to Red Line's defense and the Court ignored the import of Jackie Anderson's Affidavit, the testimony by Raschick contradicting Respondents' defense and ignored material inconsistencies and admissions of Red Line.

The court turned the facts in this case upside down in a strained conclusion.

Raschick was hired as a full time telemarketing manager by Red Line in July 1983 and fired in October 1983. On the one hand, the Court says "After Raschick left the company, Red Line did not look for a replacement." In the same paragraph the Court states, "Twenty-two months after Raschick's termination, Red Line again decided to employ a full-time telemarketing manager." (Appendix; p. 64, Jackie Anderson Aff.)

Red Line was able to convince the Court that it did not need a replacement after Raschick left even though it hired a replacement two months after Raschick left. Red

Line now has a telemarketing program with a manager and more than one, less than five employees, (Crews Depo. p. 90; Appendix; p. 64, Anderson Aff.). Red Line would have buried itself before a jury by closing its case with such doublespeak. For a jury would easily put in alignment Red Line's actions with their statements.

To look at Raschick's and Red Line's testimony, which the Court did not personally hear, it was inappropriate for the Court to dismiss Raschick's testimony in favor of the contradictory testimony of Red Line's witnesses. Weighing testimony and assessing the credibility of witnesses remains the locus of the jury, not the Court.

Raschick, with decades of marketing experience, who had for over 20 years directed Queen Bee Advertising, Inc., with 77 employees, (Raschick Depo. p. 16), was induced by a Red Line newspaper ad, that promised unlimited opportunity through a

position directly answerable to the president, to apply his considerable expertise and experience for Red Line's benefit. (Goldenberg Depo. p. 15). Raschick testified that Crews related the company goal to him as that of Raschick's department opening 20% of eligible nursing homes contacted by telephone. (Raschick Depo. p. 48) Crews denied this, testifying about some vague concept of $20,000 profitability in Raschick's department. No proof of the time within which this was to be accomplished, nor how it was to be calculated, whether further sales by in-person contacts following the cold phone calls by Raschick's department that initially opened the accounts, was proffered by Crews' testimony. (Crews Depo. p. 34). Raschick refuted Crews denial by stating the 20% goal was the only goal the company gave him. (Raschick Depo. p. 48). Raschick testified that his department averaged 40% and that his department's

accounts over a long period could account for millions in sales. (Raschick Depo. p. 45). In fact Red Line admitted that the first state Raschick's department opened, a state where Red Line had no business before Raschick came aboard, was generating millions in sales less than two years after he was hired. (Crews Depo. p. 41). Red Line brought forth no proof that the present telemarketing manager is receiving salary or commissions at a rate equal to the commissions Raschick was to receive according to his contract. A reasonable inference, actually compelling, is that when Red Line realized the success of the department, it fired Raschick so it could replace him with a younger, naive, employee who would not tap the lucrative profits by receiving commissions. What else but age discrimination can that be? Red Line hires Raschick, a man in his fifties, with decades of marketing experience--necessarily an older individual by

virtue of his experience--entices him with promises of unlimited opportunity and suggestions of 55 to 60 thousand dollars annual earnings (Raschick Depo. p. 92). Then--when the department did twice as well as Red Line had expected, Red Line fired him and pocketed the commissions they saved.

After Raschick's dismissal, Red Line camouflaged job descriptions by eliminating the telemarketing designation while continuing the telemarketing function in a 22-month juggling act with job-titles. Satisfied its legal moves would pass muster, it then announced that it had a full time telemarketing manager.

The Court, succumbing to the temptation to act as judge and jury, accepted without reservation the Red Line position, finding that Raschick increased the telemarketing department four-fold while the sales within the department failed to double. Although dollar figures were not the test, as the

test was a 20% quota of new accounts (Raschick Depo. p. 46) which Raschick's department doubled (Raschick Depo. p. 47), the Court chose not to leave this factual dispute to the jury. And the Court gives us no idea where it determined sales within the department did not double. No charts, no summaries or records were offered by Red Line to prove sales did not "even double." And does the Court really mean that a jury may not consider sales in the millions of dollars from nursing homes which Raschick's department opened? (Raschick Depo. p. 45; Crews Depo. p. 41).

The success of Raschick's department was recognized by Red Line's president who told Raschick, "Despite the obstacles that we put before you, you have done a masterful job" (Raschick Depo. p. 41).

The Court also ignored the potent evidence Raschick presented, and Red Line admitted, establishing that Red Line did not

wait 22 months to replace Raschick. They replaced him within 2 months.

The Court says after Raschick left, "Red Line resumed telemarketing in the same way it had been performed prior to Raschick's hiring, i.e., without a full-time manager". (Appendix p. 42) This statement, though it parrots Red Line's pretext for Raschick's discharge, is not supported by the record. Red Line admits Teri McEwen began a full scale telemarketing effort in November, 1980 and ending in 1981, when she was promoted.

Another program was established in December 1982, using Jim Bloomer until he resigned in June of 1983, when Teri McEwen returned to telemarketing.

Raschick then was hired as full-time telemarketing manager. When Raschick was fired, Bill Crews took total control of the department and the two remaining operators, Lane Hagemeyer and Teri McEwen.

In January 1984, two months after

Raschick's dismissal, Jane Levy was hired to manage telemarketing under supervision of Ron Opdahl, who managed the newly created marketing department. Levy was fired in March, 1984.

David Lehman replaced Levy, managing telemarketing and other, alleged, tasks.

In July 1985, another full-time mangager for telemarketing was employed, Suzanne Parker. (Anderson Aff.)

Taking the Red Line position in the most favorable light, it is clear that telemarketing was not the same after Raschick left as it was before. Only McEwen and Bloomer were doing telemarketing before Raschick was hired and they were not doing it at the same time.

After Raschick was fired in October 1983, two telemarketers were working, directed by Bill Crews and aided by Jackie Anderson. Then--only two months later--telemarketing demanded the attention of two

more persons, Ron Opdahl and Jane Levy. Two months later Lehman replaced Levy.

Raschick had four employees in 1983, and in August 1985, Red Line admitted to having a full-time manager. According to Financial Officer Jeffrey Kolmer at the time of his deposition (Nov. 1986) there was a full-time Telemarketing Manager manager and a staff of four or five. (Kolmer Depo. p. 71). There was little similarity between Red Line's telemarketing operation before Raschick created it and afterwards.

Without offering proof, Red Line belabors what they term "absenteeism." In 10 pages of testimony (Raschick Depo. pp. 60-70) Red Line implies that Raschick's department had chronic absenteeism, despite Raschick's clear statement:

> "The not-show-up-for-work problem existed during my vacation period ... After I got back, I heard how bad my crew was. I heard complaints about them regarding absenteeism." (Raschick Depo. p. 60)

Red Line's president (Goldenberg Depo. p.

44) confirms Raschick's testimony:

> "And also while Walt was gone, the people weren't showing up. We had one person who didn't show up, I believe, for a couple days and no call or nothing, he just wasn't there, and people were coming in late."

Absenteeism is not reporting for work when scheduled, a problem that Raschick testifies he did not have. Raschick's testimony (Raschick Depo. p. 38) indicates his concern about work schedules, dictated by Red Line, that incubated idleness and frustration with his staff. Raschick's testimony about not being given sufficient work to keep a motivated staff busy throughout the day incorporated his worry about inactivity breeding potential absenteeism.

A jury, able to hear Raschick's testimony about absenteeism that allegedly occurred while Raschick was on vacation, would have no trouble in concluding that Red Line policy in its telemarketing decisions could trigger

frustration leading to absenteeism. (Raschick Depo. p. 38). Such a panel would make its own inference on how effective and practical were the steps Raschick took to prevent--and not be penalized by--potential absenteeism.

Raschick testified that he had very little absentee problems. Company president Goldenberg testified, in confirmation, that during Raschick's vacation, the absenteeism started. The conclusion is inescapable that Raschick controlled his department with his presence and that any problems he had were the result of his staff requesting to quit work early when there was not enough work for them to do.

II

The Court of Appeals exceeded their authority by tampering with U.S. Supreme Court formulae by interjecting a 5th prong to the Supreme Court's 4-pronged test.

Red Line admitted they replaced Raschick

with a full-time telemarketing manager two years after Raschick's discharge. The Court, despite this admission of Red Line, threw Raschick out of court. In so doing, the Court set up in addition to the fourth criterion under McDonnell--that a defendant replaced a discharged worker with a worker of similar skill--a fifth criterion, viz., not only that a replacement was accomplished, but that the replacement take place within two years. See, Nordquist v. Uddeholm Corp., 615 F. Supp. 1191 (D.C. Conn. 1985) (six month lapse in age discrimination suit between discharge and replacement constituted prima facie case). Such a drastic change in the law should have been left to the Congress. Without such a change in law by Congress it was incumbent upon the Court to submit the replacement issue to the jury.

CONCLUSION

This case--by permitting the Eighth Circuit Court's opinion to stand--would add one more cross to carry for all in the 40 to 70 age group of our society. Thus would be decreed an additional "means test," changing the present 4-prong prima facie test into a 5-prong test, where the Supreme Court has established that the 4-prong test is the proven standard, and sufficient.

Petitioner, therefore, because of inherent danger in the effect such a ruling would have on his person and all workers in the 40 to 70 age group, respectfully requests that the Summary Judgment granted in favor of the Respondents be reversed, for reasons stated herein, and that this case be remanded to the District Court for trial.

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A P P E N D I X

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5120

Walter A. Raschick, Appellant, v. Prudent Supply, Inc. and Red Line Medical Supply, Inc., division of Prudent Supply, Inc., Appellees.	Appeal from the United States District Court for the District of Minnesota

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Submitted: September 4, 1987

Filed: October 15, 1987

Before HEANEY, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BRIGHT, Senior Circuit Judge.

Walter A. Raschick appeals from the district court's[1] grant of summary judgment against him on his claim of age discrimination brought under the Age Discrimination and Employment Act (ADEA). 29 U.S.C. ss. 621, et seq. (1982). On appeal, Raschick contends that the district court erred in granting summary judgment when, according to Raschick, a prima facie case of age discrimination may be inferred from the record. After reviewing the record, we are satisfied that Raschick did not present evidence sufficient to establish a prima facie case. Thus, we affirm the district court's grant of summary judgment.

I. BACKGROUND

Defendants/appellees (hereinafter referred to as Red Line) sell medical

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[1] The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

supplies to nursing homes in most parts of the United States. Sales are made primarily through the efforts of outside sales personnel who make in-person calls at various nursing homes (accounts). Red Line also engages in telemarketing, which involves making telephone calls to potential new accounts and attempting to sell Red Line products over the telephone.

Prior to July of 1983, Red Line engaged in telemarketing only sporadically and had never committed more than one full-time employee to the task. In July of 1983, Red Line decided to expand its telemarketing by hiring a full-time telemarketing manager. Red Line advertised the position and received a response from Raschick. Red Line's president, Herbert Goldenberg, the controller, Jeffrey Kolmer, and the national sales manager, William Crews, were impressed with Raschick's twenty years of experience in telemarketing and agreed to hire him.

By August of 1983, Raschick fully staffed his department. However, Red Line's limitations on solicitation territories increasingly upset Raschick because the lack of territory would ultimately lead to lower sales commissions for him.[2]

On September 14, 1983, Raschick, frustrated with the restriction on territories, submitted his resignation to Crews. His resignation letter reads, in part:

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[2] Raschick's employment contract provided for $3,250 monthly salary for the months of August and September. From October thereafter, his salary would be $2,000 per month plus commissions. The commissions were based on the amount of sales exceeding $30,000 per month. In his deposition, Raschick stated he was frustrated because less territory meant less sales and that the level of sales in the first two months would not support his expectation of salary if that level of sales continued into the period in which his salary would be, in part, based on commissions.

> In the company's best interests I feel it best to step aside, confident that the present staff will accomplish company goals without me. Therefore, with regret, I hereby tender my resignation, effective a week from today.
>
> Additional territory is needed to keep three full-time operators busy and that territory is not ready for solicitation at this time.

At the time he submitted the letter, Raschick intended on resigning. He also hoped the letter would prompt management to open up new territories for telemarketing. If this occurred, he would not resign. Raschick asserts that Crews, upon reviewing the letter, told Raschick that he, Crews, was satisfied with Raschick's work and that new territory would be given. Thus, Raschick decided not to resign. However, on October 21, 1983, Crews told Raschick that he was discharged.

Red Line has a different view of what transpired after Raschick submitted the letter. Red Line claims that Crews, after reviewing the letter, told Raschick that

Crews needed to discuss the resignation with Goldenberg and Kolmer in order to decide what to do. While Raschick was on vacation, Crews, Goldenberg and Kolmer met and reviewed the letter, together with the sales figures from the telemarketing department. They found that the number of full-time people in the department had increased from one to four, while the sales had not even doubled. Based on these disappointing results, Crews, Goldenberg and Kolmer agreed to accept Raschick's resignation.

On July 12, 1984, Raschick filed with the EEOC a charge of age discrimination against Red Line. The EEOC informed Raschick that it could not process the charge because the EEOC could not substantiate the alleged discrimination. Raschick then filed the present action in federal district court. Subsequent to discovery between the parties, the district court granted Red Line's motion for summary judgment. The court determined that

Raschick failed to establish two of the four essential elements of the McDonnell Douglas test for a prima facie case of discrimination. The district court determined that Raschick failed to show he performed his job at a level that met Red Line's expectations and that Red Line replaced him, thus showing a need for the same service or skill. This appeal followed.

II DISCUSSION

In reviewing a grant of summary judgment, our duty is to determine whether there is a genuine issue as to any material fact in the litigation. Fed. R. Civ. P. 56(c). On review, we view the facts in the light most favorable to Raschick and will give him the benefit of all reasonable inferences which may be made from the underlying facts disclosed in the record. See Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983).

In order to establish a prima facie case of age discrimination under the revised

McDonnell Douglas test, a plaintiff must establish all of the following elements: (1) the plaintiff was in the protected age group; (2) he or she performed the job at a level that met the employer's legitimate expectations; (3) he or she was fired; and (4) the employer tried to replace the plaintiff with someone else who would provide the same service or skill. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 289 (8th CIR. 1982).[3] If the plaintiff is successful in establishing a prima facie case, the defendant has the burden of producing some legitimate non-discriminatory reason for the alleged discriminatory action. Halsell, 683 F.2d at 291.

Two of the four elements of Raschick's

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[3] Although this is not the only way to establish a prima facie case of age discrimination, see Halsell, 683 F.2d at 289, this is the manner in which Raschick presents his case on appeal

prima facie case are not in dispute. First, Raschick must be in the protected age category. The protected age category is " * * * at least 40 years of age but less than 70 years of age." 29 U.S.C. ss. 631 (a) (1982). Raschick was fifty-five years of age at the time he began and left the employ of Red Line and thus is within the protected age category. Second, Raschick must have been discharged (fired). Although Red Line claims that it took Raschick's resignation for what it purported to be, Red Line concedes, as it must, that it fired Raschick.

The second element of the prima facie case Raschick must establish is that he performed the job at a level that met Red Line's legitimate expectations. Essentially, Raschick argues that he established this element by showing that Crews originally rejected Raschick's resignation and praised Raschick for doing a good job. In addition, Raschick asserts that he met all the sales

quotas set by Crews.

We believe Raschick produced sufficient evidence to establish the factual issue of whether Raschick performed his job at a level which met Red Line's legitimate expectations. Thus, we believe he did establish this element of his prima facie case.

The fourth element of the prima facie case Raschick must establish is that Red Line sought a replacement, thereby demonstrating a continued need for the same service and skill. No factual dispute exists as to this element.

Raschick increased the telemarketing department four-fold while the sales within the department did not even double. Because the then current and future sales were low, Raschick wanted more territory so that he could increase his salary. Red Line gave territory to Raschick in a piecemeal fashion. Red Line had no obligation to provide Raschick all the territory he requested.

After Raschick left the company, Red Line did not look for a replacement. Instead, Red Line resumed telemarketing in the same way it had been performed prior to Raschick's hiring, i.e., without a full-time manager. An existing employee supervised the two remaining telemarketing operators. The employee used only a small portion of her time for this responsibility. Twenty-two months after Raschick's termination, Red Line again decided to employ a full-time telemarketing manager.

Having reviewed the record in this case, we determine that Raschick failed to establish the fourth element of his prima facie cse. We believe a reasonable jury, given the record, could not conclude Red Line had a continued need for a full-time telemarketing manager subsequent to Raschick's termination. See Anderson v. Liberty Lobby, Inc., ____U.S.___,____, 106 S. Ct. 2505, 2512 (1986); Halsell, 683 F.2d at 290-91. Rather,

Red Line made a legitimate decision not to expand the department as Raschick desired. Unhappy with the high overhead and absenteeism within the department, Red Line chose to step back and reevaluate its goals in telemarketing. Red Line did not, in fact, hire another full-time telemarketing manager for two years. This undisputed testimony establishes that Red Line did not have a continuing need for a full-time manager. Thus, Raschick clearly did not establish the crucial fourth element of his prima facie case--that is, a need to replace the older employee who had been discharged.

An inference of age discrimination cannot be drawn from these facts. See Buller, 706 F.2d at 846. Indeed, the usual facts leading to an inference of discrimination in an age discrimination case are absent in this case. Often, the employee starts working for the employer at a young age. The employee is fired after reaching the protected age

category. In this case, Raschick was fifty-five years of age when hired by the same people who eventually fired him.

III

We conclude that Raschick failed to establish his prima facie case of age discrimination. Thus, we affirm the district court's grant of summary judgment in favor of Red Line.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Walter A. Raschick,

Plaintiff,

v.

Prudent Supply, Inc. and
Red Line Medical Supply, Inc.,

Defendants.

CIVIL 4-85-1428

MEMORANDUM AND ORDER

Peter M. Rosene, Rutman, Rosene & Haugrud, 2650 American National Bank Building, 101 East Fifth Street, St. Paul, MN 55101, and H. Louis Sirkin, Sirkin, Pinales & Schwartz (Of Counsel), Suite 832, 105 West Fourth Street, Cincinnati, OH 45202, for plaintiff.

Thomas B. Hatch, Robins, Zelle, Larson & Kaplan, 1800 International Centre, Minneapolis, MN 55402, for defendants.

This matter is before the Court on defendants' motion for summary judgment. Defendants' motion will be granted.

FACTS

Plaintiff is a resident of Frederic,

Wisconsin, and a former employee of defendant, Red Line Medical Supply Co. (Red Line). Red Line is a Minnesota company engaged in the sale of medical supplies to nursing homes throughout the United States. Red Line is a wholly-owned subsidiary of Prudent Supply, Inc., a Minnesota corporation. This is an action arising under the Age Discrimination in Employment Act, 29 U.S.C. ss. 621 et seq.

Red Line offers a wide variety of nursing home products, which are marketed primarily through independent sales representatives. In June, 1983. Red Line president Herb Goldenberg, controller Jeff Kolmer, and national sales manager William Crews made a decision to expand Red Line's "telemarketing" sales program. Prior to June, 1983 Red Line employed only one fulltime telemarketer. Plaintiff Walter Raschick responded to Red Line's advertisement for a telemarketing manager. Raschick has more than twenty years of telemarketing experience as president of Queen Bee Advertising, Inc., a

Cincinnati-based telemarketing concern. Raschick was given the position of telemarketing manager and began employment with Red Line July 25, 1983. Raschick was then 55 years of age.

As Red Line telemarketing manager, Raschick had authority to staff the newly-created telemarketing department, to supervise telemarketing employees, and to direct Red Line's telemarketing sales program. Toward this end Raschick hired two fulltime salespersons and one parttime salesperson. Raschick accepted a compensation package of $3,250 per month for the period July-October, 1983, and $2,000 per month thereafter, plus commissions and bonuses. Telemarketing salespersons were also paid on a salary plus commissions basis.

Because Red Line was new to telemarketing, it looked to Raschick to develop an effective telemarketing sales program. Raschick informed Crews, Kolmer, and Goldenberg that he would know within thirty days whether telemarketing

of Red Line products could be successful. Walter Raschick Deposition 11-12. The employment agreement executed by Raschick and Red Line provided that:

> It is understood that the Company wishes this effort in Telemarketing to be successful. However, it is solely the Company's option to continue or discontinue this program at any time.

Exhibit 1 in Support of Defendants' Motion for Summary Judgment at 2.

By August 1, 1983, the Red Line telemarketing department headed by Raschick was fully operational. Plaintiff alleges that sales efforts were hampered from the outset by lack of sales territory. Because telemarketing efforts were limited to eleven states, the salespersons hired and supervised by Raschick were frequently idle. Raschick expressed concern about the lack of sales territory to his superiors, but was informed that additional territory would not be forthcoming. On September 14, 1983 Raschick submitted to Crews a letter of resignation.

The letter stated in substance that Raschick felt that without additional territory his operators could not keep busy, and that it was in Red Line's "best interests" that Raschick step aside. Crews met with Raschick to discuss the letter of resignation September 16, 1983. Plaintiff alleges that Crews encouraged Raschick not to resign, and promised that additional sales territory would be assigned. Crews' recollection of the meeting differs from that of plaintiff in some respects. Defendants contend that plaintiff's letter of resignation was accepted. For purposes of this motion, of course, plaintiff's version of this disputed factual issue is taken as true.

Plaintiff took vacation leave from September 26 to October 11, 1983. While plaintiff was on leave, Crews, Kolmer and Goldenberg met to discuss plaintiff's letter of resignation. Crews, Goldenberg and Kolmer reviewed telemarketing sales figures and

agreed that the results were disappointing. They also agreed that the department could be run without plaintiff's supervision. Affidavit of Jeffrey D. Kolmer in Support of Defendants' Motion for Summary Judgment par. 3; Affidavit of William Crews in Support of Defendants' Motion for Summary Judgment par. 7. Accordingly, a decision was made to terminate plaintiff's employment effective October 21, 1983. Plaintiff was informed of his termination from employment when he returned from vacation October 11, 1983. At the time of his discharge plaintiff was 55 years of age.

Plaintiff filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC) July 12, 1984. By letter dated March 28, 1985, the EEOC informed plaintiff that it would not process the charge. Thereafter, plaintiff filed this age discrimination action against Red Line and its parent corporation, Prudent Supply,

Inc.. Defendants now bring this motion for summary judgment.

DISCUSSION

A defendant is not entitled to summary judgment unless the defendant can show that no genuine issue exists as to any material facts. Fed.R.Civ.P. 56(c). Summary judgment is an extreme remedy that should not be granted unless the moving party has established a right to judgment with such clarity as to leave no room for doubt and unless the nonmoving party is not entitled to recover under any discernible circumstances. E.g., Vette Co. v. Aetna Casualty & Surety Co., 612 F. 2d 1076, 1077 (8th Cir. 1980). In considering a summary judgment motion, a court must view the facts most favorably to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. E.g., Hartford Accident & Indemnity Co. v. Stauffer Chemical

Co., 741 F.2d 1142, 1144-45 (8th Cir. 1984). The nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. Salinas v. School District of Kansas City, 751 F.2d 288, 289 (8th Cir. 1984).

The standard for summary judgment set forth in Rule 56 is comparable to the standard for a directed verdict set forth in Rule 50(a). Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). The relevant inquiry is whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented, that is, whether there is evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. Anderson, 106 S.Ct. at 2512. Rule 56 mandates the entry of summary judgment against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986). In such a situation there can be no genuine issue as to any material fact since a failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Celotex, 106 S.Ct. at 2553.

Age Discrimination

In order to prevail in a suit under the ADEA, a plaintiff must ultimately demonstrate that age was a factor which made a difference in the adverse employment decision. Tribble v. Westinghouse Electric Corp., 669 F.2d 1193, 1196 (8th Cir. 1982), cert. denied, 460 U.S. 1080 (1983); Jacobson v. Pitman-Moore, Inc., 573 F.Supp. 565, 450 (D.Minn. 1983), remanded on other grounds, Order (8th Cir.

Mar.28,1985). A plaintiff, moreover, has the initial burden of establishing a prima facie case of age discrimination. Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 289 (8thCir. 1982), cert. denied, 459 U.S. 1205 (1983). A mere belief by a plaintiff that he or she was the victim of age discrimination is itself insufficient to establish a prima facie case. See LaGrant v. Gulf & Western Mfg. Co. Inc., 748 F.2d 1087, 1090 (6th Cir. 1984); Bobbitt v. PBA, Inc., 31 FEB 366, 367 (BNA) (D.Minn. 1983). "[T]he proof necessary to establish a prima facie case will vary according to the circumstances of [each] case ...." Halsell, 683 F.2d at 289.

A frequently used means of establishing a prima facie case is the indirect method of proof based on the Supreme Court cases of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). See Crimm v. Missouri Pacific Railroad Co., 750

F.2d 703, 711 (8th Cir. 1984). To establish a prima facie case under this method, plaintiff must show:

(1) that the plaintiff is within the protected age group;

(2) that s/he was demoted or discharged;

(3) that s/he was performing the job at a level that met the employer's legitimate expectations; and

(4) that the defendant sought someone to perform the work previously performed by the plaintiff after the plaintiff was demoted or discharged.

See, e.g., Crimm, 750 F.2d at 711; Kimberly-Clark, 683 F.2d at 290. If the plaintiff fails to establish a prima facie cae, then the defendant is entitled to summary judgment. Pace v. Southern Railway System, 701 F.2d 1383, 1391 (11th Cir.), cert. denied, 104 S.Ct. 549 (1983); but cf. Thornbrough v. Columbus and Greenville Railroad Co., 760

F.2d 633, 641 n.8 (5th Cir. 1985) (summary judgment inappropriate if plaintiff demonstrates that genuine fact issues exist regarding establishment of prima facie case). If a prima facie case is established, the burden shifts to the employer to articulate a valid reason other than age for discharging the plaintiff. If the employer does so, the burden shifts back to the plaintiff to demonstrate that the reasons advanced by the employer were pretextual. Texas Department of Community Affairs v. Burdine, 450 U.S 248 (1981).

In this case defendants argue convincingly that plaintiff is unable to satisy the fourth prong of the McDonnell Douglas test--proof that defendants sought someone to perform the work previousy performed by the plaintiff after the plaintiff was demoted or discharged. On the date of plaintiff's discharge two of the telemarketers supervised by plaintiff were also discharged. This left

Red Line with only two fulltime telemarketing operators, Lane Hagemeyer, whom plaintiff had hired, and Teri McEwen, who had been the sole telemarketer prior to plaintiff's hire. Defendants contend that following plaintiff's discharge they decided to "step back" and "reevaluate" the telemarketing campaign and to "perform telemarketing in much the same fashion as we did prior to [plaintiff's] hire." Crews Aff. par 8. In essence, Red Line decided to proceed with a limited number of operators with a parttime supervisor, rather than a full staff with a fulltime supervising director. Accordingly, the fulltime director's position held by plaintiff was eliminated. The documentary evidence in the case supports this argument. Following plaintiff's departure Jackie Anderson took on supervision of the two remaining telemarketing operators, however, these duties were only a "small portion" of her overall duties as marketing service

manager. Affidavit of Jackie Anderson in Support of Defendants' Motion for Summary Judgment par. 7. In January, 1984 marketing became a separate department of Red Line and Ron Opdahl assumed the position of director of marketing. Jane Levy was hired as assistant marketing director, and as part of her duties managed the telemarketing operators. Levy was discharged in March, 1984 and replaced by David Lehman. Lehman managed the operators until July, 1985 when Suzanne Parker was hired as a fulltime mangager of telemarketing operations. Anderson Aff. par. 9.

Based on the foregoing chronology of events, it is clear that Red Line did not immediately hire or promote anyone to fill the position vacated by plaintiff. Rather, plaintiff's duties were assigned to an existing manager as part of that manager's overall duties. It was not until twenty-two months following plaintiff's discharge that

defendants retained a fulltime telemarketing manager. Plaintiff has failed to demonstrate that the defendants sought someone to perform the work previously performed by the plaintiff after the plaintiff was demoted or discharged.

Defendants have also made a persuasive showing that plaintiff was not performing the job of telemarketing manager at a level that met defendants' legitimate expectations. Telemarketing at Red Line under plaintiff's direction was not as productive as Red Line's executives had thought it would be. See Affidavit of Jeffrey D. Kolmer in Support of Defendants' Motion for Summary Judgment par. 5; Crews Affidavit par. 7. In addition, the telemarketing salespersons hired and supervised by plaintiff experienced problems with absenteeism and lack of product knowledge. Anderson Aff. par. 11. In sum, the Court finds that plaintiff is unable to meet either the third or fourth elements of the McDonnell

Douglas test.

Plaintiff alleges that he was the victim of age discrimination, including a "youth orientation" at Red Line. However, plaintiff has totally failed to point to any overt acts or words which show any discriminatory conduct toward plaintiff based upon his age. Since the plaintiff has failed to make out a prima facie case of discrimination under the McDonnell Douglas, and since the plaintiff has presented no evidence of discrimination based upon his age, the Court is compelled to find that summary judgment for the defendants is appropriate.

Accordingly, based on the foregoing, and upon review of all files, records, and proceedings herein,

IT IS ORDERED that defendants' motion for summary judgment is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

Dated: February 6, 1987.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

- - - - - - - - - - - - - - - - -

Walter A. Raschick,

Plaintiff,

vs.

Prudent Supply, Inc., et al,

Defendants.

Court File No.
4-85-1428

AFFIDAVIT
OF JACKIE
ANDERSON

- - - - - - - - - - - - - - - - -

STATE OF MINNESOTA) ss.

COUNTY OF HENNEPIN)

Jackie Anderson, being first duly sworn upon oath, deposes and states as follows:

1. I am currently the manager of the Home Health Division at Red Line. I have been an employee of Red Line since August 1980, and if called to testify, I could competently testify as to all of the matters set forth in this Affidavit.

2. Telemarketing at Red Line has gone through several changes over the years. Initially, the city desk personnel would do

some telemarketing when they had the time. As the business grew, it became apparent that city desk could no longer handle the telemarketing duties.

3. In late November 1980, Teri McEwen began a full-scale telemarketing effort. She continued through July 1981 when she was promoted to city desk supervisor. At that point, direct telephone contact with the accounts ceased and all future business from telemarketing accounts was generated through the mailing of catalogs and flyers.

4. In December 1982 another formal telemarketing program was established utilizing Jim Bloomer as the sole telemarketing operator. I was Mr. Bloomer's immediate supervisor and, at that time, I held the title of Marketing Services Manager and was also the assistant to William Crews, the National Sales Manager.

5. Mr. Bloomer resigned in June 1983, and Teri McEwen stepped in and continued to

call on the accounts in the territory which Mr. Bloomer worked in. .

6. In July 1983, Mr. Raschick was hired as a full-time telemarketing manager to begin a telemarketing program in certain territory not serviced by Teri McEwen. Teri McEwen continued to do telemarketing in the territory assigned to her, but under my supervision, not Mr. Raschick's.

7. After Mr. Raschick left in October 1983, I supervised the two remaining telemarketing operators, Lane Hagemeyer and Teri McEwen. Management of these operators was only a small portion of my duties as Marketing Services Manager.

8. At the end of 1983, I took the opportunity to start up the Home Health Division, of which I am now the manager.

9. In or about January 1984, marketing became a separate department of the company, and Ron Opdahl assumed the position of Director of Marketing. Jane Levy was hired

as Assistant Marketing Director, and as part of her duties, she managed the telemarketing efforts. She was discharged in March 1984, and David Lehman replaced her. He also took over management of the telemarketing area as well as many other responsibilities.

10. It was not until July 1985, when Suzanne Parker was hired, that a full-time manager for telemarketing was employed.

11. There were many problems with the telemarketing operators hired by Mr. Raschick. In my opinion, all of them suffered from a lack of product knowledge. For example, Mary Larson attempted to sell "catheathers" instead of catheters. Bill Koppang was excessively absent and some of his absences may have been due to a drinking problem. At one point, he was absent for three days in a row and never called in to say where he was. We later learned that he had been arrested on a DWI. Lane Hagemeyer was an extremely talented sales person and

was the top producer in terms of sales volume of all the telemarketing operators hired by Mr. Raschick. However, Mr. Hagemeyer lacked discipline and also had a problem with absenteeism. He was eventually discharged in November 1984.

FURTHER YOUR AFFIANT SAYETH NOT.

_____

Jackie Anderson

Subscribed amd sworn
to before me this 15th
day of October, 1986.

_____

Catherine A. Hunsacker
Notary Public